Supreme Court, U.S.
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NO. 90-1461

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Mary H Carter, Tahnella Jackson, and Lemore Allen,
Petitioners

v.

South Central Bell,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ISSUES PRESENTED

1. Does 42 USC sec. 1981 apply to the discharges of Carter and Jackson, particularly where they involve the equal opportunity to make and to avoid making contracts?

2. Is Allen's retaliatory discharge actionable under sec. 1981?

3. If sec. 1981 does not apply to the discharges of Carter and Jackson, should Patterson fairly apply retroactively where the two purposes of Patterson - as stated by the Court of Appeals - have already been served? Where the Court's finding that Carter and Jackson had not proved retroactivity would be unfair was based on: (1) failure to meet a burden of proof that did not arise until post-trial; (2) the Court's new, changed "findings" about Patterson's reasons for filing under sec. 1981 (see Lavender, infra); (3) no opportunity on remand for Carter and Jackson to meet their burden of showing unfairness.

4. Should Patterson fairly apply retroactively to Allen's retaliatory discharge?

5. Does the Court have a duty to find a cause of action in the "noticed" facts of Carter and Jackson's complaints where the facts pleaded under sec. 1981 were the same as those that could have been timely pleaded under Title VII and the only reason the Court dismissed their complaints was "because section 1981 no longer affords them a basis on which we can grant relief"?

LIST OF PARTIES

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DECISIONS BELOW

The decision of the United States Court of Appeals, Fifth Circuit, is reported at 912 F.2d 832 (5th Cir. 1990). It is reproduced in the appendix.

Ten copies of the unreported decision of the trial court have been lodged with the clerk.

STATEMENT OF JURISDICTION

The judgment (opinion) of the Court of Appeals was entered on September 27, 1990. A Petition for Rehearing before the panel and a Suggestion for Rehearing en banc were denied on December 6, 1990. The judgment as mandate was entered December 17, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1). Jurisdiction in the trial court was based on 28 USC 1343.

STATUTE INVOLVED

42 USC sec. 1981:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

STATEMENT OF THE CASE

This petition arises out a motion for partial dismissal (based on Patterson) filed by defendant pending plaintiffs' appeal from a judgment dismissing their complaints. (The motion does not seem to be mentioned in the Court's opinion.) All three (3) plaintiffs appealed; the Fifth Circuit granted the motion as to Carter and Jackson. As to Allen, the Court dismissed his sec. 1981 discharge action, but maintained his Title VII discharge action. All three plaintiffs are petitioners here.

SUMMARY OF THE ARGUMENT

1. The discharges of Carter and Jackson, particularly because they involve the equal opportunity to make and avoid making contracts, are actionable under section 1981.

A white employee (at the bottom of the seniority list) was very worried about a layoff. Unless two more senior employees (the two plaintiffs, both black) were laid off, she would be let go. She had a private meeting with her immediate supervisor, probably made a private deal, and quit worrying. Within (11) days, petitioners, not invited to this private meeting, had been tricked into signing a "voluntary" layoff (VAMAP) contract. Petitioners lost their jobs; their co-employee kept hers. Under sec. 1981 petitioners should have had the same opportunity to make a private "job-protection" agreement and the same opportunity to avoid signing the VAMAP layoff contract as the white employee.

Moreover, Patterson did not reach the issue whether sec. 1981 applied to discharges. Petitioners adopt the opinion of the Eleventh Circuit in Hicks, supra, no. 90-324, pending in this Court.

2. Allen's retaliatory discharge is actionable under sec. 1981. Petitioner adopts the opinion of the Eleventh Circuit in Hicks.

3. Patterson should not be fairly applied retroactively to the Carter/Jackson case because its purposes would not be served by retroactivity and petitioners are not similarly situated with Patterson. Those two purposes, as stated by the Court of Appeals - limiting sec. 1981 to contracts and preserving Title VII remedies - have already been served. The gravamen of the actions is the above two discriminatory agreements. Further, plaintiffs, who exhausted all Title VII remedies, could have pleaded a timely count under that section.

Retroactivity is not fair because petitioners are not similarly situated to Patterson. In Lavender, supra, the Court "presumed" that Patterson had filed under sec. 1981 because she was untimely under Title VII. However, in this case the Court made the **new** "finding" that Patterson sued under sec. 1981 for "unknown reasons." Not finding (and not seeking, as on remand) any reason that Carter and Jackson sued under sec. 1981, the Court concluded that because Patterson and petitioners were "similarly situated", petitioners "would have a difficult time proving that retroactive application of the same decision would be unfair...(and) that they have not met that burden."

The burden of proving unfairness, particularly by distinguishing themselves from Patterson, did not arise until post-trial and then only on the Court's new and changed "findings" about Patterson's reasons for proceeding under sec. 1981. On remand, petitioners could show that they obtained right-to-sue letters and that their sec. 1981 complaints were **timely** as to Title VII. In short, petitioners would not have a difficult time distinguishing themselves from Patterson and proving unfairness.

A final, and most important, distinction is that Patterson was not appealing her discharge and the holding of her case was not made retroactive to her discharge. In the present two (2) discharge cases retroactivity works a substantial hardship that deserves a closer look than that given by the Court of Appeals.

4. Patterson should not be fairly applied retroactively to Allen's retaliatory discharge because the Title VII conciliatory purposes would not be served as defendant chose the risk of sec. 1981.

5. Even if sec. 1981 does not apply or Patterson is retroactive, the "accepted rule" is that a complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." These Carter/Jackson complaints pleaded exactly the same facts as would have been pleaded under Title VII, but invoked sec. 1981. The Court of Appeals had a duty to scrutinize the facts of the complaint for a cause of action and grievously erred when it violated the "accepted rule" by dismissing the complaints because "section 1981 no longer affords...a basis on which we can grant relief." The Court erred when it stated that it had "no duty to substitute (plaintiffs') abrogated ('failed') theory with a valid one." (Emph. added.) It is the facts which state a cause of action, not the plaintiffs' theory of the case!

ARGUMENT

1. Carter and Jackson state a cause of action under 42 USC sec. 1981 as narrowed by Patterson because they were denied the equal opportunity, first, to make a "job protection" agreement with their employer and, then, to avoid

making a "job termination" agreement with their employer.

Although the facts of this argument have been summarized above, they will be briefly expanded here for the sake of clarification. With additions (underlined), this summary tracks that of the Court of Appeals at pages A-4 et seq. of the appellate opinion in the appendix.

Barbara Johansen, a white employee, was the junior employee in the plaintiffs' work group in the Westbank Division of New Orleans; the two petitioners were black and slightly senior to Johansen. On April 6, 1984 defendant, South Central Bell (SCB) announced a layoff. Shortly thereafter (April 11), three plans were announced. Two are of significance: Voluntary Accelerated Management Attrition Program (VAMAP) and Involuntary Management Attrition Program (IMAP). VAMAP would be offered to the senior employees in order; IMAP would be imposed on the junior employees (Johansen) first. After the announcement of these plans, Johansen was very worried about losing her job.

On April 19, 1984, she had a private meeting with her immediate supervisor, Pete Massett. This meeting did not include plaintiffs. After this meeting she was no longer worried. Four days later Massett told plaintiffs that VAMAP would select only fourteen (14) employees and over the next few days also told them that fourteen more senior employees, some of whom were identified by Massett, would be chosen for VAMAP. Convinced by Massett that they could sign the VAMAP contracts and that the fourteen more senior employees, but not the plaintiffs themselves, would be chosen, the plaintiffs picked VAMAP on April 30, 1984. Johansen helped plaintiffs identify some of these fourteen employees and admitted that she knew that anyone who signed up for VAMAP would be selected; she did not pick VAMAP.

A few days later, before SCB announced on May 7 who had been selected for VAMAP, Jackson was surprised when Johansen thanked her for "saving her job." (Johansen admitted that she thanked Carter.) To plaintiffs' further surprise, they were chosen for VAMAP and Johansen kept her job.

The "private meeting" between Massett and Johansen was pivotal to the new contract of "voluntary" termination (VAMAP) that plaintiffs signed. As stated by the Court of Appeals:

> The essence of their claim is that they were manipulated into volunteering because of their race.
>
> .....
>
> All three appellants testified that Johansen was very worried about losing her job after she was told about SCB's need to cut its work force, but that after she had a private meeting with Massett, she was no longer worried. Carter and Jackson allege that they were encouraged to join VAMAP because they are black and that Johansen's job was protected because she is black. (at A5-6)

It is the petitioners' position that at this private meeting which did not include them there was a job protection agreement made with Johansen at their expense. It was at this meeting that the plan for Massett to deceive the plaintiffs into accepting the VAMAP contract was put into action in order to protect Johansen's job. Although no finding whatsoever has been made about the purpose of this meeting, the obvious inference is that Johansen knew what was going to happen and participated in the plan. She was under no illusions about VAMAP - she admitted that she knew if an employee signed up for it then the employee would be chosen and also admitted that even before the VAMAP an-

nouncement was made she "thanked" one of the plaintiffs for "saving her job." Notwithstanding this knowledge, she "helped" plaintiffs in their efforts to locate fourteen other employees who would be taking VAMAP and who would thereby protect the plaintiffs themselves from being selected even if they signed up. When Carter and Jackson signed the "voluntary" layoff form under the VAMAP program, they unknowingly agree to termination.

The Court of Appeals did not consider these "contract" arguments in its ruling on the motion to dismiss. This was error and is reason for granting this petition because these facts fit squarely within the logic and language of the Patterson holding. That case held that a promotion was actionable under section 1981 where

> it involved the opportunity to enter into a new contract with the employer....

and

> ...[o]nly where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under [sec.] 1981. at 2377 (plurality).

Obviously, this is not a promotion case. However, both the "private meeting" and the VAMAP contract ought to be actionable under section 1981. The private meeting excluded the plaintiffs. It was held between the favored employee, Johansen, and her supervisor, Massett. Johansen quit worrying about layoff. Within four days Massett "deliberately misinform[ed]" the plaintiffs about VAMAP. (See appellate opinion, p. A-15.) Obviously a deal was made between Johansen and Massett that rose to the level of a "new and distinct relation" between

Johansen and SCB. She would keep her job and plaintiffs, who were not favored with this opportunity, would lose their jobs[1].

Carter and Jackson were also discriminated against with respect to the VAMAP contract. Deceiving them into signing this contract of termination was the intent of the first agreement to save Johansen's job. Just as they should have had the opportunity to make a private "job security" agreement, they should have had the equal opportunity to avoid making the VAMAP "job termination" contract. In a sense, they were given an unequal opportunity to make a second contract - the VAMAP contract - and that **contractual**, not "constructive", discrimination is actionable under sec. 1981.

Carter and Jackson also adopt the opinion of the Eleventh Circuit in Hicks.

2. Allen's retaliatory discharge is also actionable under sec. 1981.

Patterson did not reach the issue whether discharge was actionable under sec. 1981. Allen adopts the opinion of the Eleventh Circuit in Hicks.

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[1] Objection might be made that the agreement between Massett and Johansen would be unenforceable and that a similar agreement between Massett and petitioners would likewise be unenforceable. However, the lack of enforceability should not alter the fact that an agreement was made and that the petitioners did not have an equal opportunity to make the same agreement. Patterson does not exclude unenforceable contracts from sec. 1981. Furthermore, although the contract might be void, it is not null. 17 CJS, Contracts, sec. 189.

3. Even if the Carter/Jackson complaints do not state a cause of action under sec. 1981, Patterson fairly should not be applied retroactively because the purpose(s) of Patterson is fully satisfied by the circumstances of the filing of this case.

The Court of Appeals states that Patterson has a two-fold purpose: to limit section 1981 to contracts and to preserve the conciliatory scheme of Title VII. With respect to limiting section 1981 to contracts, this statement of purpose is overbroad because, stated this way, a contract claim would already (as above) be actionable under section 1981 as narrowed, and the issue whether Patterson should be retroactive would not be reached. (However, if limiting sec. 1981 to contracts is one purpose, then that purpose is satisfied twice over as shown above.)

Accordingly, it would seem that limiting sec. 1981 to contracts is the "holding" of Patterson, not its purpose. In other words, the only purpose of Patterson in a determination of retroactivity is preservation of the Title VII administrative/ conciliatory purpose. On remand, petitioners would show that they received right-to-sue letters, dated no earlier than March 26, 1985, and that their complaints were filed on April 16, 1985 - well within the period required by Title VII. Unlike certainly the plaintiff in Lavender, supra, and "presumably" the plaintiff in Patterson (see Lavender, supra, at 807) petitioners did not bring their action under sec. 1981 in order to avoid a statute of limitations problem under Title VII. (Further, see pp. 11, 15-17 below.)

In the Court of Appeals' earlier occasion (Lavender, supra) to determine whether to apply Patterson retroactively, the Court expressly found that by the time plaintiff sought to file a sec. 1981 claim of racial discrimination, "the time limitation for Title VII had expired." at 807. It also stated that Patterson "filed a section 1981 action presumably because the Title VII limitation period

expired." Id. Finding an equivalence between the two plaintiffs, the Court affrimed dismissal.

However, in the instant case the Court now abandons its earlier presumption and states that Patterson filed her action under sec. 1981 for "unknown reasons". Without further fact inquiry, the Court then found that Carter and Jackson had also filed sec. 1981 actions for "unknown reasons" and were "similarly situated" to Patterson. Therefore, it would not be unfair also to apply Patterson retroactively against petitioners.

Making such short (and changing) shrift of the fact finding process at the appellate level is extraordinary. In one broad stroke the Court wrecked havoc on several normal processess:

> 1. It has cut off all fact inquiry into whether petitioners are truly similar to Patterson, and for that matter to Lavender (who was known to have filed her sec. 1981 action after time had run out to file a Title VII action).
>
> 2. It has blocked any determination whether the Title VII administrative purpose has been satisfied.
>
> 3. It has thereby prevented any reasonable inquiry whatsoever into whether retroactive application is fair to petitioners.
>
> 4. It has abrogated petitioners' normal pre-trial right to amend to show a cause of action. (See below.)

Finally, as to the fairness issue, **and most importantly,** Patterson was retroactively applied to plaintiff's promotion claim, not her discharge claim. Accordingly, the Court of Appeals is in error when it equates petitioners and Patterson: they are **not** similarly situated and retroactivity is considerably more harsh as applied to petitioners than as to Patterson.

Essentially the Court requires petitioners to have anticipated both Patterson and the new facts about its plaintiff as announced in the present case, i.e., to have distinguished themselves by somewhere explaining in advance of Lavender by "known reasons" why they were bringing their actions under sec. 1981, not Title VII. This process of explanation is properly one on remand for the trial court, not the Court of Appeals. There are more than two (2) categories - known (untimeliness) and "unknown" - of reasons for filing a sec. 1981 action instead of a Title VII action. The Fifth Circuit rule that it will apply Patterson retroactively without remand for a determination of the "unknown" reason clears the docket, but sweeps with too broad a broom - it cuts off all inquiry into whether petitioners have fulfilled the conciliatory purposes of Title VII and, ultimately, the fairness of applying Patterson retroactively.

At the time of filing counsel for petitioners made what then seemed like a harmless pleading choice with no thought of avoiding the conciliatory procedures of Title VII (already completed) in order to seek the greater damages (emotional distress and punitive damages) under section 1981. (See Merwine v. Bd. of Trustees, 754 F.2d 631 (5th Cir. 1985), cert. den. 106 S.Ct. 76; Hernandez v. Hill Country Telephone Co-Op, Inc. 849 F.2d 139, 142 (5th Cir. 1988).

As this Court has held in language relevant to this argument and the "duty" argument below:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. Conley, infra, at 102.

The Fifth Circuit itself has recognized the gross unfairness of proceeding solely on the law at the expense of the facts:

> We see no reason why we should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties. Robertson v. Johnston, 376 F.2d 43, 44 (5th Cir. 1967), citations omitted.

4. Patterson should not fairly be applied retroactively to Allen's retaliatory discharge.

If sec. 1981 does not cover Allen's discharge, then Patterson fairly should not apply retroactively to the discharge.

By its nature, retaliatory discharge is outside the conciliatory process of Title VII; the facts of this retaliatory discharge place it particularly outside the Title VII process. Here, Allen had gone through the Title VII process on two charges while he was employed at South Central Bell (SCB). Instead of conciliating the parties, the process resulted in a lawsuit during which SCB discharged Allen without any attempt whatsoever at conciliation. Further, the Court of Appeals has found that Allen's discharge was partly motivated by retaliation. In short, SCB has rejected the Title VII process and decided to run the risk of damages under sec. 1981. Under these circumstances, where the Title VII process has been irrelevant, it is unfair to "let SCB off the hook" and avoid a risk it knowingly chose to take.

5. The Court of Appeals ignored its well recognized duty to scrutinize the facts of the Carter/Jackson complaint - even where a "failed" legal theory is cited - in order to find a cause of action under another statute.

The part of the appellate opinion at issue reads:

> Carter and Jackson never pled Title VII. Nevertheless, they claim that we have a duty to substitute Title VII for section 1981, their failed cause of action. They cite two cases this propostition: Hildebrand and Rohler (citations omitted). But the appellants' arguments and the cited authority are relevant only if the appellants' complaint had a jurisdictional defect. (Citation omitted.) We are dismissing their complaints because section 1981 no longer affords them a basis on which we can grant relief...We have no duty to substitute Carter and Jackson's abrogated theory with a valid one.... (at 6389)

The facts of the complaints create in the Court the "obligation" (long recognized by the Fifth Circuit) to "scrutinize the complaint and to let it stand if plaintiff might recover under any state of facts which could be proved in support of the claim..." General Guaranty Ins. Co. v. Parkerson, 369 F.2d 821,825 (5th Cir. 1966), citing Conley, supra; other cites omitted. This duty runs even if "the plaintiff's lawyer has misconceived the proper legal theory of the claim...." Dotschay v. National Mutual Ins. Co., 246 F. 2d 221, 223 (5th Cir. 1957)[2].

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[2] This rule, citing Dotschay, is followed in the Ninth Circuit as well even when the lawyer cites the wrong theory. U.S. v. Howell, 318 F.2d 162, 166 (9th Cir. 1963); Haddock v. Board of

[2] continued next page

This Court has recognized the general rule in Conley v. Gibson, 78 S.Ct. 99, 102 (1957):

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

There is no reason to depart from this well-settled rule because the petitioners cited a "failed/abrogated" legal theory and the Court of Appeals cites no authority for its novel rule. No special treatment for a civil rights case is required to implement the established rule and none has been sought. (See

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[2] continued

Dental Examiners, 777 F.2d 462 (9th Cir. 1985); Airline Pilots Ass'n v. Transamerica Airlines, Inc., 817 F.2d 510, 516, also citing 5 C. Wright & A. Miller, Federal Practice and Procedure sec. 1357 (1969).

Judge Clark, then on the Second Circuit, wrote: "... (P)articular legal theories of counsel yield to the court's duty to grant the relief to which the prevailing party is entitled, whether demanded or not." Gins v. Mauser Plumbing Supply, 148 F.2d 974, 976 (2d Cir. 1945).

It is also the rule in the Seven and Eighth Circuits. Parr v. Great Lakes Express Co., 484 F.2d 767, 773 (7th Cir. 1973); Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974); Thomas W. Garland, Inc. v. City of St. Louis, 596 F.2d 784 (8th Cir. 1979), cert. den.

Significant district court decisions also recognize this duty. U.S. v. Provident National Bank, 259 F.Supp. 373 (E.D. Pa. 1966), rev'd on other grounds 1967, 87 S.Ct. 1088 (irrelevant statute cited; court should take judicial notice of the correct statute); Jenkins v. Fidelity Bank, 365 F. Supp. 1391, 1398 (E.D. Pa. 1973).

appellate opinion at 6389.)

Several Fifth Circuit cases other than those cited above (including Rohler, distinguished by the Court of Appeals), confirm the Fifth Circuit's well established recognition of its own rule. Rohler is not "relevant only if the appellants' complaint had a jurisdictional defect." (Appellate opinion at A-18.) It holds:

> We believe that the district court has the duty under Rule 8(a)...to read a complaint liberally and to determine whether the facts set forth justify it in taking jurisdiction...**and also whether the facts set forth state a claim for relief on a basis other than the statutory basis pleaded**. at 1264. (Emphasis added.)

Other Fifth Circuit cases hold that failure to correctly categorize the legal theory or pleading an improper legal theory is not fatal to a complaint. Dussouy v. Gulf Coast Investment Corp., 660 F.2d 594, 604 (5th Cir. 1981); Doss v. South Central Bell Telephone Co., 834 F.2d 421, 424 (5th Cir. 1987) and citations. The normal course is to grant leave to amend. Dussouy, supra, at 604; Robertson, supra, at 45 and citation.

Doss, supra, is an excellent case in point. Plaintiff pleaded the wrong statute against this same defendant and repeatedly asserted that the theory at issue was correct. The district court dismissed this claim. The Court of Appeals reversed, although it termed the miscitation "not a technical mistake, but rather, a conscious decision made under an incorrect analysis of the law." at 424. The Court held that "the fact that a plaintiff pleads an improper legal theory does not preclude recovery under the proper theory." (citations omitted) Further, that the district court must "'examine the complaint to determine if the allegations provide for relief on any possible theory.'" at 424. (citations omitted.)

Here, there was likewise a conscious choice to cite what turned out to be the wrong legal theory, but unlike Doss the wrong theory was not knowingly cited. Although the court noted it was the complaint, not the actions of counsel, that were to be considered, it is worth noting that the Doss situation was exacerbated in a way not present here. Yet, amendment apparently was allowed. The Court of Appeals offered no authority why a different result should obtain when the "wrong" cited theory was, as its opinion seems to acknowledge, "right" at the time it was cited and "failed" only after trial.

Finally, the repeal of a statute that was the basis for an action is somewhat analogous to the abrogation of a legal theory. A class of plaintiffs had challenged a statute, repealed and replaced by a new statute. As a consequence, the original named plaintiffs lost their standing, but the Fifth Circuit allowed the subclass to intervene. Lynch v. Baxley, 651 F.2d 387, 388 (5th Cir.1981). Similarly, the petitioners' narrower subclaims under Title VII, minus their claims for emotional distress and punitive damages under sec. 1981, should be allowed to go forward by way of amendment.

The Court's duty to scrutinize a complaint cannot be reduced in a case that even it admits established a "new principle of law" and for that reason failed to support plaintiffs' cause of action. This suggestion is made because procedural rules are "devised to promote the ends of justice, not defeat them." Hormel, supra, at 557. As Justice Black wrote in Conley, supra, at 103:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

In a similar vein Judge Wisdom wrote in Thompson v. Allstate Ins. Co., 476 F.2d 746, 749 (5th Cir. 1973):

> The time when the slip of a sergeant's quill pen could spell death for a plaintiff's cause of action is past.

The policy of the federal rules is to determine actions on their merits, not dispose of them on technical grounds. Partridge v. Two Unknown Police Officers, 791 F.2d 1182, 1189 (5th Cir. 1986); Travelers Indemnity Co. v. U.S., 382 F.2d 103,106 (10th Cir.1967) (justice is not served when technical rules result in the forfeiture of just claims). Despite the Court of Appeals' citation to Bell v. Hood, supra, as the above cited cases make clear, the court's duty to "look to the way the complaint is drawn" does not run only to jurisdictional problems. at 775.

All that has happened here is that Carter and Jackson chose the wrong theory after following the Title VII conciliatory procedures as far as they were available. They could have filed a timely Title VII complaint; the action was not filed under sec. 1981 to avoid timeliness problems. They ought to be given the opportunity to amend to show a cause of action under Title VII. This is no less than they would have ordinarily been allowed before trial; to refuse after a trial on the merits, apparently for the sake of extending Patterson, seems harsh. Granting leave to amend (if the complaints are found not actionable under sec. 1981) should also include the opportunity to demonstrate on the same facts that this case should not come within the retroactive application of Patterson because its Title VII purpose has been fully met.

In short, the Court's duty should be to determine this case on the merits, not the misfortune of petitioners.

CONCLUSION

As to Carter and Jackson, sec. 1981 should be found to apply to their discharge complaints. (See Hicks.) Moreover, they have been denied the equal opportunity to make two new contracts with their employer. If sec. 1981 does not cover their complaints, then Patterson should be found not retroactive so that the complaints would still be actionable under sec. 1981. If the complaints are not actionable at all under sec. 1981, then the Court should find Title VII causes of action in the facts of their complaints. Finally, if the complaint is found actionable under either legal theory, then the matters should be remanded to the trial court for adequate findings as prayed for in petitioners' original brief.

As to Allen's retaliatory discharge complaint, that should be found still actionable under sec. 1981, notwithstanding Patterson. If not, then Patterson should not be applied retroactively because the conciliatory Title VII purpose has been irrelevant to SCB and it chose to "run the risk" of damages under sec. 1981. The Court should leave SCB where it is.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

Mary H Carter, Plaintiff-Appellant,
v.
South Central Bell,
Defendant-Appellee.

Tarnella (sic) Jackson, Plaintiff-Appellant,
v.
South Central Bell Telephone Co., Defendant-Appellee.

Lemore Allen, Plaintiff-Appellant,
v.
South Central Bell, Defendant-Appellee.

No. 88-3777.

United States Court of Appeals,
Fifth Ciruit.

September 27, 1990.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, JOHNSON, and SMITH, Circuit Judges.

THORNBERRY, Circuit Judge:

Mary H. Carter, Tahnella Jackson, and Lemore Allen appeal a judgment of a United States Magistrate dismissing their claims of racial discrimination by their former employer, South Central Bell Telephone Company (SCB). Because they have not stated a claim under section 1981 of title forty-two, we AFFIRM the dismissal.

The appellants also have asked us to consider their claims under Title VII of the Civil Rights Act of 1964. See 42 U.S.C.

secs. 2000e to 2000e-17. Carter and Jackson never pled Title VII at trial, and we refuse to consider that theory on appeal. Although Allen did plead Title VII as a basis of recovery, we AFFIRM the magistrate's dismissal of two of his complaints under Title VII. But we REVERSE that portion of the magistrate's decision which rejected Allen's claim of retaliatory termination and REMAND it with instructions to reconsider Allen's claim in the light of this opinion.

FACTS AND PROCEDURAL HISTORY

Because the background for Carter and Jackson's claims is different from that of Allen's claims, the history behind Allen's complaint will be discussed separately.

I. CARTER AND JACKSON

Carter and Jackson, black females, were employed in the engineering group of SCB's Westbank Division in New Orleans, Louisiana. Their supervisor was Lester Hopper, a white male.

On April 6, 1984 employees of the Westbank Division learned that SCB wanted to reduce its Louisiana work force by 250 employees, twenty-five of whom would be from the New Orleans area. To mitigate the effect of this reduction on SCB's managers, the Personnel Office in Birmingham, Alabama, created a Management Transition and Assistance Plan (MTAP). Under MTAP, SCB could reduce its work force in one of three ways:

1. Separation in Lieu of Relocation (SILOR). If an employee was designated as available for relocation, the employee would have the option of either relocating or terminating her employment with SCB. If, at that point, the employee decided to terminate employment, she would receive a lump sum payment.

2. Voluntary Accelerated Management Attrition Program (VAMAP). The purpose of VAMAP was to encourage employees to quit their jobs voluntarily. Employees were given a limited period of time during which they could sign a form requesting VAMAP eligibility. From this pool of volunteers, employees would be terminated until the group had been reduced to the desired number of employees. The most senior employees, those with the most service, would be chosen first. Employees who were selected for VAMAP would be given a lump sum payment that was thirty-three percent more than the amount that they would receive if they did not select VAMAP and were terminated under SILOR.

3. Involuntary Management Attrition Program (IMAP). If neither SILOR nor VAMAP had sufficiently reduced the number of employees, employees would be fired and given the same amount that they would have receive under VAMAP.

On April 11, 1984, Peter Massett, a white male supervisor at the Westbank Division, explained MTAP to the Westbank employees. Apparently, Massett told them that the third option under MTAP was "layoff without pay" rather than IMAP. According to SCB's brochure, IMAP was implemented on April 10, 1984; "layoff without pay" was never a possibility.

Although Jackson attended the April 11 meeting, Carter and another female engineer, Barbara Johansen, did not. Johansen is white. On April 16, Massett met with Carter and Jackson and gave them the same information he had given to the others.

Carter and Jackson volunteered for VAMAP and were selected. The essence of their claim is that they were manipulated into volunteering because of their race.

Carter and Jackson testified that Massett had met with them individually and encouraged them to volunteer for VAMAP.

They contend that he told them that only fourteen employees would be selected for VAMAP and that if they chose VAMAP and were not selected, they would be protected from SILOR and from being laid off. Massett denied that he had any idea of how many employees would be selected for VAMAP. He also denied encouraging Carter and Jackson to select VAMAP.

Carter and Jackson made phone calls to other offices to determine how many employees were going to vounteer for VAMAP. They allege that they told Massett of the employees with whom they had spoken and that Massett told them of other senior employees who were going to take the plan. Convinced that at least fourteen managers were going to select VAMAP, all of whom were senior to them, Carter and Jackson chose VAMAP. After they had made their selection, Massett told them that "layoff without pay" was not one of the programs under MTAP. He told them about IMAP and gave them the opportunity to rescind their VAMAP selection. They decided to stick with VAMAP.

As it happened, only thirteen employees in the Westbank Division signed up for VAMAP. All thirteen were chosen. Ten are white, and three, including Carter and Jackson, are black.

Johansen did not choose VAMAP. All three appellants testified that Johansen was very worried about losing her job after she was told about SCB's need to cut its work force, but that after she had a private meeting with Massett, she was no longer worried. Carter and Jackson allege that they were encouraged to join VAMAP because they are black and that Johansen's job was protected because she is white.

Carter and Jackson brought a claim against SCB under alleging racial harrassment and constructive discharge. See 42 U.S.C. sec. 1981. Both consented to a non-jury trial before a U.S. Magistrate, who held that they had failed to prove that SCB's

conduct was racially motivated. They are appealing that decision. See 28 U.S.C. sec. 636 (c).

II. ALLEN

Allen was hired in 1972 and was the first black engineer in the Westbank Division. He contends that SCB discriminated against him in three ways: by failing to transfer him to the "Plannig Group," by lowering his performance rating, and by firing him after he filed charges against SCB with the Equal Employment Opportunity Commission (EEOC).

A. Transfer to Planning

The Planning Department was supervised by Aaron Begnaud, a white male. The Planners were responsible for bringing the main telephone cable into an area, whereas engineers at Allen's level were charged with the more mundane task of connecting local homes and businesses to the main cable. For an engineer at SCB, a transfer to Planning was not a promotion, although it may have been a necessary prerequisite for promotion, it was not sufficient. At trial, Begnaud gave examples of many Planners who had never been promoted.

In September 1984, a position became available in the Planning Group when James Burse, a black employee, was terminated. Allen had expressed an interest in the Planning job, but it was given to Johansen, although she had less experience than Allen. Johansen was hired as an engineer at Westbank in 1973.

B. Allen's Performance Rating

Lester Hopper kept a list of all of the Engineers in the Westbank Division in the order of their contribution to SCB. An engineer could be rated a "major contributor" (MC), a "satisfac-

tory contributor" (SC), or an "unsatisfied contributor" (UC). Only the top fifty percent of the engineers could be given an MC rating. The rankings were determined at a Rank Order Meeting chaired by Hopper, but based on the evaluations by the engineers' individual supervisors. Phil Chavers, a white male, was Allen's supervisor, and his rating of Allen determined where on Hopper's list Allen would be ranked.

In January 1985 and January 1986, Allen was given an evaluation of his job performance that rated him SC. During that same period, Johansen was rated MC. (Johansen's supervisor was Massett.) In January 1984, Allen had been rated MC. Allen contends that he was given an SC rating in 1986 because of his race.

Massett and Chavers used both objective and subjective factors to evaluate engineers. Objective factors included the size and complexity of the tasks that the engineers performed. Among Chavers' subjective reasons for his evaluation of Allen were that Allen did not get along with other SCB employees and with customers, that he did not make a full effort on routine engineering jobs, and that some of his work had been deficient.

C. Retaliation

Allen filed charges with the EEOC claiming that his evaluation and the failure to transfer him to Planning were motivated by racism. After receiving his right to sue, he filed this lawsuit. Several months later he was fired. Allen alleges that he was fired because he filed charges with the EEOC and then proceeded to sue SCB.

On October 21, 1986, Hopper told Allen that he was terminated. The reasons for his discharge have vacillated. Under "reasons for termination," his pink slip says "other," and at the time of his termination, Hopper refused to give him a written

explanation of what "other" meant. SCB later claimed that Allen was terminated because he had given proprietary documents to his attorney and because he had falsified an automobile accident report. At trial, SCB dropped the automobile incident as one of the reasons for his dismissal. Now, in their briefs before this Court, both parties have again discussed the accident. Allen also raises several incidents which, he maintains, illustrate the unfair treatment that he allegedly received after he filed his charges with the EEOC.

1. Proprietary Documents

In August 1986, Allen's counsel used an estimate front sheet in his deposition of Johansen. Estimate front sheets contain information regarding job estimated performed by SCB employees. Several days later, he used a job log book in a deposition of Chavers. Hopper attended both depositions, and after the second, he wrote a letter to his manager, Glenn Andrews, advising him that Allen may have appropriated proprietary information from the company. Andrews asked the security department to conduct an investigation.

The investigation was conducted by John Banquer. Banquer questioned Allen about the estimate front sheet and the log book. Allen refused to answer Banquer's questions without the presence of his attorney. Banquer prepared his report for Andrews. Andrews reviewed the report and concluded that Allen should be discharged. The rationale behind his decision was that Allen had turned over the documents to his counsel and that he had refused to cooperate in the investigation.

The magistrate found that Allen had turned the estimate front sheet and the log book over to his attorney for use in this proceeding, and Allen offered no other explanation for how his attorney obtained them except to say that he thought his attorney had subpoenaed them. Allen also admits that SCB considered this

information to be "proprietary." His only defense is that the documents were not marked "proprietary" even though SCB policy is to state that all "proprietary" documents should be so marked. However, employee instructions, which Allen received at the time of his employment, stated that employees are not to divulge the contents of any SCB document to anyone not associated with SCB.

Even if the documents were proprietary, Allen argues that termination was an exceptionally harsh measure. On October 16, 1986, SCB attorney Charles Rivet sent a memo to Andrews advising him to "go on the offensive" regarding the alleged appropriation of the documents. Allen also introduced evidence the fourteen SCB employees had used the private phone number of a radio station, which SCB admits was "proprietary," to win prizes from the radio station. By calling the private number instead of the public one, they could avoid a busy signal when prizes were offered. All fourteen employees cooperated in the investigation. Twelve, who are white, admitted that they had used the number and were suspended. The two others, who are black, denied any involvement and were not disciplined.

2. False Accident Report

In September 1986, Allen drove over a curb in a company vehicle, and the vehicle was damaged. Allen testified that he told his manager what had happened and that the manager told him to treat it as a flat tire. SCB did not contradict this. Allen filed an accident report stating that he had a flat tire. Because of the amount of damage to the vehicle, SCB conducted an investigation, which determined that Allen had been responsible for the accident. The filing of the false accident report initially was one of the grounds for Allen's termination.

3. Other Incidents

Allen also points to number of incidents that support his retaliation claim. For example, when Allen wrote a letter complaining to Chavers about his ratings, Allen testified that Chavers refused to discuss the letter and remarked, "Everybody knows you filed the lawsuit."

Soon after that, Allen was assigned a rush estimate project, but he was scheduled to go on vacation and advised Chavers that he would not be able to complete the estimate before leaving. Chavers allowed Allen to transfer the estimate to another engineer for completion. The job was done poorly, and the estimate front sheet was issued under Allen's name. Chavers knew that Allen had not performed this job, but he still used it in his quality reviews of Allen.

D. Procedural History

In his initial complaint, Allen asserted that SCB's actions violated both Title VII, see 42 U.S.C. sec. 2000e-5, and section 1981. Allen's action was consolidated with that of Carter and Jackson. After he was terminated, Allen amended his complaint by adding the charge that SCB had fired him vindictively. The magistrate found no support for Allen's charges of discrimination and dismissed his claims.

DISCUSSION

I. RETROACTIVE APPLICATION OF PATTERSON

After this case was tried, the Supreme Court decided Patterson v. McLean Credit Union, __U.S. __, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), which restricted the use of section 1981 in employment discrimination suits. As a general rule, this Court must apply any relevant interpretation of section 1981 by the

Supreme Court retroactively. See Goodman v. Lukens Steel Co., 482 U.S. 656, 662, 107 S.Ct. 2617,2621, 96 L.Ed.2d 572 (1987); Solem v. Stumes, 465 U.S. 638, 642, 104 S.Ct. 1338,1341, 79 L.Ed.2d 579 (1984). But in some civil cases, a judicial decision should not be applied retroactively if certain criteria countenance prospective application. Rodriquez de Quijas v. Shearson/ American Express, Inc., __ U.S. __, 109 S.Ct. 1917,1922, 104 L.Ed.2d 526 (1989). Three guidelines are used to make this determination: whether the decision establishes a new principle of law; whether the purpose of the rule will be supported if the rule is applied retroactively; and whether retroactive application will produce substantial injustice or hardship. See Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07,92 S.Ct. 349,355-56,30 L.Ed. 2d 296 (1971).

This Circuit has already concluded that Patterson does establish a new principle of law, which would militate against retroactivity, but that the purpose of Patterson is best served by retroactive operation. See Lavender v. V & B Transmissions & Auto Repair, 897 F.2d 805,806-07 (5th Cir. 1990). If the purpose of the rule is served by applying it retroactively, this should be given greater weight than the extent to which the parties relied on the law that existed before the rule was announced. In re S/S Helena, 529 F.2d 744,748 (5th Cir. 1976). But we must still consider whether the retroactive application of Patterson would cause substantial injustice to these appellants.

As explained below, if we were to apply Patterson to this case, the appellants would no longer have a cause of action under section 1981. But the Supreme Court itself applied its decision retroactively to Brenda Patterson, denying her section 1981 claim. Patterson, like Carter and Jackson, chose, for unknown reasons, to pursue a remedy only under section 1981 and not under Title VII. See Patterson, 109 S.Ct. at 2375. Because the Supreme Court applied its holding retroactively to a similarly situated individual, rather than announcing a rule of prospective

application, the appellants would have a difficult time proving that retroactive application of the same decision would be unfair. See Williams v. Phil Rich Fan Mfg. Co., 553 F.2d 596,600 n. 9 (5th Cir 1977). We conclude that they have not met that burden. Therefore, we will apply Patterson's interpretation of section 1981 to this case.

EFFECT OF PATTERSON

A. Racial Harassment

Section 1981 provides, in part, that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens." 42 U.S.C. sec. 1981. With respect to the relationship between the employer and employee, section 1981 protects the employee's right to make contracts and to enforce contracts. Patterson, 109 S.Ct. at 2372.

The right to make contracts prohibits the employer from refusing to hire someone because of their race or from offering to hire someone only on discriminatory terms. Id. It does not protect the employee from any conduct by the employer after the contractual relationship has begun. Id. at 2373.

The right to enforce contracts is the "right of acess to legal process, that will address and resolve contract-law claims." Id. The employer may not do anything to hinder the employee's efforts to enforce the employment contract through the legal process. Id.

Patterson's interpretation of section 1981 explicitly bars any of the appellants' claims based solely on racial harassment. See id. For example, Allen's SC rating did not impair his right to make or enforce his employment contract. But the holding in Patterson was limited to racial harassment. If Carter and Jackson

were manipulated into volunteering for VAMAP, SCB's actions resulted in their discharge. This could be labeled "constructive discharge" rather than simply "harassment." Moreover, two of Allen's claims, that SCB denied him a promotion and fired him in retaliation for taking legal action against them, are also not explicitly covered by Patterson.

B. Constructive Discharge: Carter and Jackson

The Supreme Court did not decide whether section 1981 prevents an employer from firing an individual because of her race. See Lytle v. Household Mfg., Inc., ___ U.S. ___, 110 S.Ct.1331,1336 n. 3, 108 L.Ed.2d 504 (1990); Jett v. Dallas Indep. School Dist., __ U.S. __, 109 S.Ct. 2702,2709-19, 105 L.Ed.2d 598 (1989). After Patterson, we have held that it does not. See Walker v. South Cent. Bell Tel., 904 F.2d 275,276-77 (5th Cir. 1990); Lavender,897 F.2d at 807-08; Carroll v. General Accident Ins. Co. of America, 891 F.2d 1174,1177 (5th Cir. 1990). Most Circuits have agreed with us. See Gonzalez v. Home Ins. Co., 909 F.2d 716 (2d Cir. 1990); McKnight v. Ceneral Motors Corp., 908 F.2d 104, 109 (7th Cir. 1990); Courtney v. Canyon Television & Appliance Rental,Inc., 899 F.2d 845,849 (9th Cir. 1990). But see Hicks v. Brown Group, Inc., 902 F.2d 630, 638-40 (8th Cir. 1990).

Two arguments support the conclusion that section 1981 no longer applies to discriminatory discharge. First, discriminatory termination impairs the employee's right to perform the employment contract, not her right to enter into the contract nor to enforce it.

Second, if "conduct is covered by both section 1981 and Title VII, the detailed procedures of Title VII are rendered a dead letter," and, therefor, a court "should be reluctant" to construe section 1981 broadly if that construction will allow a plaintiff to circumcent Title VII. See Patterson, 109 S.Ct. at 2375. Title VII

remains a valid remedy if an employee is terminated for discriminatory reasons. See Meyer v. Brown & root Constr. Co., 661 F.2d 369,371 (5th Cir. 1981); Pittmen v. Hattiesburg Mun. Separate School Dist. 644 F.2d 1071, 1074 (5th Cir. Unit A May 1981).

We will not stretch the protection of section 1981 to conduct that Title VII already proscribes. Therefore, even if Massett did deliberately misinform Carter and Jackson about VAMAP because they are black, they would not have a cause of action against SCB under section 1981.

C. Failure to Promote Allen

Allen argues that SCB's refusal to transfer him to planning amounted to a failure to promote him. "Whether a promotion claim is actionable under sec. 1981 depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer." Patterson, 109 S. Ct. at 2377. The promotion must "rise [] to the level of an opportunity for a new and distinct relation betweeen the employee and the employer." Id. Cf. Saint Francis College v. Al-Khazraji, 481 U.S. 604, 609-10, 107 S.Ct. 2022, 2026, 95 L.Ed. 582 (1987)(applying section 1981 to professor's charge that he was denied tenure because of his race).

In this case, we need not dissect the Court's "new and distinct" relation criterion to test its perimeters. Cf. Malhotra v. Cotter & Co., 885 F.2d 1305,1311 (7th Cir. 1989)(proposing two interpretations of the "new and distinct relation" test). A transfer to the Planning Group was not a promotion; it was, at most, a necessary precondition to promotion, or as Allen himself calls it, "an opportunity to progress." Appellant's Opening Brief at 20. Many employees in the Planning Group were never promoted.

At the Westbank Division, a transfer to Planning was a change that was part of the ordinary progression of an SCB

engineer. See McKnight, at 908 F.2d at 110. As such, it is not within the ambit of protection given by section 1981.

D. Retaliatory Termination Against Allen

Allen claims that he was terminated because he filed a charge with the EEOC and that the reasons SCB gave for firing him - taking proprietary documents and, initially, falsifying an accident report - were pretextual.

In this Circuit before Patterson, section 1981 protected employees form retaliatory termination. See Goff Continental Oil Co., 678 F.2d 593, 598 (5th Cir. 1982). Because Goff is the law of the Fifth Circuit, we must follow its interpretation of section 1981 unless that interpretation is irreconcilable with Patterson. See United States v. Don B. Hart Equity Pure Trust, 818 F.2d 1246, 1250 (5th Cir. 1987); National Labor Relations Bd. v. Datapoint Corp., 642 F.2d 123, 129 (5th Cir. Unit A April 1981). We have questioned, but never decided, whether Goff survived Patterson[1].

See Rathjen v. Litchfield, 878 F.2d 836, 842 (5th Cir. 1989). We now hold that it does not. See, e.g., Brown v. United States, 890 F.2d 1329, 1336 & 1339 (5th Cir. 1989) (overruling a prior Fifth Circuit opinion because a subsequent Supreme Court case was implicitly inconsistent with it).

Three arguments support our holding that section 1981 no longer extends to retaliatory termination. First, Title VII will protect an employee from retaliation. See 41 U.S.C.A. § 2000e-3(a) (West 1981); Johnston v. Harris County Flood Control Dist.,

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[1] See Kozam v. Emerson Elec. Co., 739 F.Supp. 307, 310 (N.D. Miss. 1990); Jackson v. GTE Directories Serv. Corp., 734 F.Supp. 258, 265-66 (N.D. Tex. 1990).

869 F.2d 1565, 1576 (5th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 718, 107 L.Ed.2d 738 (1990). As noted above we should not interpret section 1981 to duplicate that protection unless the overlap of the two statutes is "necessary". See Patterson, 109 S.Ct. at 2375. While an employer who retaliates against an employee may discourage that employee (or others) from using the legal process, the employer has not impaired or impeded the employee's ability to enforce his employment contract. While these concepts have been construed to be synonymous, see Hicks, 902 F.2d at 638 n. 20; Malhorta, 885 F.2d at 1314 (Cudahy, J., concurring), we do not believe that it is "necessary" to do so, see Overby v. Chevron USA, Inc., 884 F.2d 470, 473 (9th Cir. 1989).

Second, when Allen filed his charge with the EEOC, he was asserting a right given to him by the Civil Rights statutes, not by his employment contract with SCB. See McKnight, 908 F.2d at 112; Sherman v. Burke Contracting, Inc., 891 F.2d 1527, 1535 (11th Cir. 1990). Therefore, Allen's right to enforce his employment contract was not impaired. Compare Goodman, 482 U.S. at 659-60, 107 S.Ct. at 2620 (challenging union's failure to assert instances of racial discrimination against employees, in violation of contractual collective bargaining agreement, under section 1981).

Finally, we have already held that discriminatory discharge is no longer actionable under section 1981. Were we to hold that section 1981 still encompasses retaliatory discharge, we would be encouraging litigation to determine what the employer's subjective motive was when he fired the employee: was it to retaliate or "merely to discriminate? This would be pointless. Both motives are equally invidious, and the employee suffers the same harm. Because section 1981 no longer covers retaliatory termination, all suits for discriminatory dismissal must be brought under Title VII.

III. TITLE VI REMEDY

Because we have decided to apply Patterson retroactively to bar their section 1981 claims, the appellants ask us to remand this case to the district court with instructions to consider their complaints under Title VII, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1981 & Supp. 1990). For the reasons given below, we decline to substitute a Title VII remedy for Carter and Jackson, but we will reach the merits of Allen's Title VII claims.

A. Carter and Jackson

Carter and Jackson never pled Title VII. Nevertheless, they claim that we have a duty to substitute Title VII for section 1981, their failed cause of action. They cite two cases for this proposition: Hildebrand v. Honeywell, Inc., 622 F.2d 179, 181 (5th Cir. 1980) and Rohler v. TRW, Inc., 576 F.2d 1260, 1264 (7th Cir. 1978). But the appellants' argument and the cited authority are relevant only if the appellants' complaint had a jurisdictional defect. See 5 C. Wright & A. Miller, Federal Practice and Procedure § 1209, at 112-14 (1990). We are not dismissing the appellants' section 1981 claims for lack of subject matter jurisdiction. See McGinis v. Ingram Equip. Co., 888 F.2d 109, 112 (Cox, J., dissenting), opinion vacated by 895 F.2d 1303 (11th Cir. 1989). We are dismissing their complaints because section 1981 no longer affords them a basis on which we can grant relief. See Bell v. Hood, 327 U.S. 678, 681-82, 66 S.Ct. 773, 775-76, 90 L.Ed. 939 (1946) (holding that federal jurisdiction exists if the complaint states a "colorable" case arising under federal law, even though on the merits the party may have no federal right); Holland/Blue Streak v. Barthelemy, 849 F.2d 987, 988-89 (5th Cir. 1988) (explaining the difference between a challenge based on jurisdictional grounds and a challenge based on a failure to state a claim upon which relief can be granted). We have no duty to substitute Carter and Jackson's abrogated theory with a valid one. See Baldwin County Welcome Center v. Brown, 466 U.S.

147, 150, 104 S.Ct. 1723, 1725, 80 L.Ed. 2d 196 (1984) (noting that Title VII actions should not be given a special status under the Federal Rules of Civil Procedure).

B. Allen

In his initial complaint, in which he alleged that SCB had discriminated against him by rating him SC rather than MC and by not transferring him to Planning, Allen asserted Title VII as one theory of recovery. He had filed his charges with the EEOC and received a right to sue for both allegations, and we will review the magistrate's dismissal of those claims.

In his amended complaint, Allen added an allegation of retaliatory termination against SCB. He never filed this charge with the EEOC, and he never received a right to sue. Normally, a Notice of a Right to Sue is a jurisdictional prerequisite to a Title VII action. See Ray v. Freeman, 626 F.2d 439, 442 (5th Cir. 1980), cert. denied, 450 U.S. 997, 101 S.Ct. 1701, 68 L.Ed. 2d 198 (1981). But because Allen's other Title VII claims were properly before the magistrate, we believe that this Court has jurisdiction over Allen's retaliatory termination claim as well. See Gottlieb v. Tulane Univ., 809 F.2d 278, 284 (5th Cir. 1987).

1. Standard of Review

A magistrate trying a case with the consent of the parties is entitled to the same deference that is given to findings of a district judge. See Lockett v. Greyhound Lines, Inc., 817 F.2d 1182, 1185 (5th Cir. 1987). Therefore, we will not set aside the magistrate's ruling unless we find that it was clearly erroneous, giving "due regard... to the opportunity of the trial court to judge the credibility of the witnesses". Fed. R.Civ. P. 52(a).

2. Performance Rating and Transfer to Planning

As noted above, SCB supervisors used both objective and subjective criteria in their performance evaluations. Although the parties dispute the relative significance of each of the objective

criterion, the magistrate found that both Allen and Johansen had the same objective ratings. Nevertheless, in the 1986 evaluation, Allen was ranked twenty-fourth and Johansen was ranked seventh. It follows that this discrepancy, and Allen's resulting SC rating[2], occurred from the use of subjective factors in evaluating the candidates.

SCB's use of subjective criteria to evaluate its engineers was not discriminatory per se. See Page v. U.S. Indus., Inc., 726 F.2d 1038, 1046 (5th Cir. 1984). But we will review SCB's subjective hiring practices under both the disparate treatment and disparate impact theories. See Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 989-90, 108 S.Ct. 2777, 2786, 101 L.Ed. 2d 827 (1988).

The disparate treatment model requires a finding of intentional discrimination. Trevino v. Holly Sugar Corp., 811 F.2d 896, 902 (5th Cir. 1987). Allen must prove more than "isolated" or "sporadic" acts of discrimination; he must prove "that racial discrimination was the company's standard operating procedure–the regular rather than the unusual practice." Id. (citing International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed. 2d 396 (1977). A disparate impact claim does not require Allen to prove SCB's discriminatory motive, but does require him to show that facially neutral employment practices fall more harshly on one group than another and cannot be justified by business necessity. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed. 2d 396 (1977).

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[2] As explained earlier, only fifty percent of the engineers in the Westbank Division could receive an MC rating. Between forty and forty-five engineers worked at Westbank The MC line was drawn at Lemore Allen, allowing a white engineer, ranked twenty-third, to receive an MC rating.

The magistrate held that Allen failed to show widespread discrimination in the use of the evaluating criteria, and we agree. A white engineer, Norman Gautreaux, was rated SC based on the same subjective factors used to evaluate Allen, and Gautreaux's quality rating in 1986 was significantly higher than Allen's. Furthermore, Phil Chavers, Allen's supervisor, also evaluated Hershel Nisby, another black employee at SCB. Nisby received an MC rating.

Applying the same tests, we find no evidence than Allen was not transferred to Planning because he is black. Begnaud testified that he had considered specific criteria in selecting the new Planner, including computer knowledge, ability to coordinate projects with other engineers, engineering expertise, and ability to sell projects to the staff. Begnaud stated that he had used these same criteria to select two former Planners who are black: James Burse and Earl Jeffers. Allen argues that in several of these areas his skills were superior to those of Johansen, but he did not demonstrate a conspicuous edge in any area except length of service with SCB. Apparently, this had never been one of the criteria for a Planning job.

Therefore, we find no error in the magistrate's dismissal of Allen's racial harassment claims.

3. Retaliatory Termination

Title VII prohibits an employer from discriminating against an employee if the employee alleges that the employer has engaged in unlawful employment practices. 42 U.S.C.A. § 2000e-3(a). To prove that SCB has violated this provision, Allen must show that he engaged in an activity protected by Title VII, that an adverse employment action occurred, and that there was a causal connection between the participation in the protected activity and the adverse employment decision. See McDaniel v. Temple Indep. School Dist., 770 F.2d 1340, 1346 (5th Cir. 1985).

Although the magistrate recited this test, we are uncertain how he applied it. Because of our uncertainty, we are remanding Allen's Title VII claim for fully developed legal conclusions consistent with this opinion.

From our reading of the record, it appears that Allen has met the first two criteria. He did engage in a protected activity, and adverse consequences ensued, the most notable of which was the decision by Chavers to use sloppy work done by another employee in Allen's performance review. The only issue that remains is whether Allen's termination and his protected activities were causally connected.

The problem in determining causation in this context is that Allen's suit and his termination are inherently interrelated. Allen was charged with having turned the estimate front sheet and log book over to his attorney, and therefore, Allen's legal action must have played a role in Glen Andrew's decision to fire him.

In a mixed motive case such as this one, the usual sequence of proof used for Title VII cases does not resolve the problem. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668 (1973). The employer cannot discharge his burden simply by proffering a legitimate reason that the magistrate believes, because both the legitimate reason and the illegal one played a part in the decision. Under these circumstances, the burden shifts to the employer to prove that he would have made the same decision regarding the employee even if he had not taken the illegitimate reason into consideration. See Price Waterhouse v. Hopkins, ___ U.S. ___, 109 S.Ct. 1775, 1786, 104 LEd.2d 268 (1989) (plurality). "[I]n multiple causation cases, where a breach of duty has been established, the common law of torts has long shifted the burden of proof to multiple defendants to prove that their negligent actions were not the 'but-for' cause of the plaintiff['s] injury." Id.

109 S.Ct. at 1797 (O'Connor, J., concurring). Furthermore, the Supreme Court has consistently shifted the burden of proof to the defendant in mixed motive cases involving constitutional violations. See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 576, 50 L.Ed.2d 471 (1977); Hunter v. Underwood, 471 U.S. 222, 228, 105 S.Ct. 1916, 1920, 85 L.Ed.2d 222 (1985).

Therefore, we hold that SCB must prove, by a preponderance of the evidence, that it would have fired Allen for taking the documents even if Allen had not been involved in litigation against SCB. By this we do not mean that the magistrate may not consider how Allen used the documents. For example, SCB does not have to show that they would have fired Allen had he taken these documents home and thrown them away. But they do have to show that dismissal was an appropriate remedy for personal use of proprietary information. This information was used against the company's interests; the magistrate may consider this as well.

IV. CONCLUSION

Applying Patterson, we hold that the appellants' claims of racial harassment and Carter and Jackson's claims of constructive discharge are no longer actionable under section 1981. Because Carter and Jackson pled only section 1981, we AFFIRM the judgment of the magistrate dismissing their claims.

Allen invoked the protection of Title VII in addition to section 1981. Applying Title VII, we find no error in the magistrate's dismissal of Allen's charges of racial discrimination, and we AFFIRM that decision. However, we are unable to understand the analysis that the magistrate used in dismissing Allen's claim of retaliatory termination, so we are REVERSING that portion of the case and REMANDING Allen's Title VII retaliatory termination claim to the magistrate with instructions to reconsider it in the light of this opinion.

APPENDIX B
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 88-3777

Mary H Carter and Lemore Allen,
Plaintiffs- Appellants,
v.
South Central Bell,
Defendant-Appellee.
Tarnella (sic) Jackson, Plaintiff-Appellant,
v.
South Central Bell Telephone Co.,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 9/27/90, 5 Cir., 198_,___F.2d____)
(December 6, 1990)
Before THORNBERRY, JOHNSON and SMITH, Circuit Judges.

PER CURIAM:
(x) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petiton for panel rehearing is DENIED. No member of this panel nor Judge in regular active service of this Court having requested thet the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Sam Johnson
United States Circuit Judge